United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1793

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B P/S

RACHEL EVANS, et al.,

Appellants,

-v-

JAMES T. LYNN, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

RICHARD F. BELLMAN
LOIS D. THOMPSON
J. CHRISTOPHER JENSEN
Suburban Action Institute
57 Tuckahoe Road
Yonkers, New York 10710

LAWRENCE F. GILBERTI,
On the Brief

5

TABLE OF CASES

	Page
Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. en banc 1973)	4
Cornelius v. Benevolent Protective Order of Elks (Docket No. 15150) (D. Conn., August 2, 1974)	5
Falkenstein v. Department of Revenue, 350 F. Supp. 887, (D. Ore. 1970); appeal dismissed, 409 U.S. 1059 (1973)	7
Jackson v. Statler Foundation, 496 F. 2d 623 (2d Cir. 1974)	5
McGlotten v. Connally, 338 F.Supp.448 (D.D.C. 1972)	6,7
Pitts v. Department of Revenue, 333 F.Supp. 662 (E.D. Wisc. 1971)	7
Warth v. Seldin, 495 F.2d 1187 (2d Cir. 1974)	1,4,5

STATUTES

Title VI, Civil Rights Act of 1964, 42 U.S.C. 2000 d et seq	2,3,4,8,9
Title VIII, Civil Rights Act of 1968, 42 U.S.C. 3601 et seq	2,3,8

AUTHORITIES

Equal Opportunity in Suburbia, Report of the United States Commission on Civil Rights, July, 1974	4
HUD, "Historic Overview - Equal Opportunity in Housing," October, 1972, P.H.Equal Opportunity Housing Reporter Par. 2301	8

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-1793

RACHEL EVANS, et al.,

Appellants,

-v-

JAMES T. LYNN, et al.,

Appellees.

and

TOWN OF NEW CASTLE

Intervenor-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

INTRODUCTORY STATEMENT

Appellants will focus their reply primarily on the attempt by the appellees to minimize the significance of the challenge to the federal abdication of civil rights enforcement, and the appellees misplaced reliance on this Court's recent decision in Warth v. Seldin, 499 F.2d 1187 (2d Cir. 1974). The distinction between Warth and the instant case will be illustrated by several recent decisions.

in this Circuit and elsewhere with respect to federal tax exemptions for discriminatory fraternal organizations. Appellants also will briefly respond to the argument made by the Town of New Castle, intervenor-appellee, that appellants' complaint fails to state a claim upon which relief may be granted.

I

Appellants in this action seek to compel the federal appellees to adhere to civil rights policies and regulations in the administration of community development grants that have a direct impact on the appellants' ability to obtain decent and integrated housing opportunities. In their brief, appellees persist in distorting the nature of this claim by variously characterizing it as an attempt to compel the construction of low-income housing or to indirectly invalidate the local zoning ordinance. While it is true that appellants' "injury in fact" flows from the lack of integrated housing opportunities, the gravamen of this action is the failure of the federal appellees to redress this lack of opportunity in the administration of their programs as mandated by the Fair Housing Act of 1968 (Title VIII) 42 USC 3601 et seq and Title VI of the 1964 Civil Rights Act 42 USC 2000 d et seq.

In these statutes, Congress expressly created a remedy intended to alleviate patterns of racial segregation and discrimination. The appellants are directly and gravely injured by the willful nonenforcement of that remedy with respect to the community development assistance to the Town of New Castle.

The intention of Congress to provide this remedy and the recognition by both federal appellees of some degree of administrative responsibility is undisputed.

In their depositions, both HUD and Interior officials conceded that Title VI and Title VIII were intended to act as a constraint upon the federal funding of community development programs in municipalities that maintained zoning and housing practices which discouraged the creation of low-income, integrated housing opportunities. (131 a, 217a) This position is reinforced by HUD's own official statements and regulations which evidence some minimal effort to promote fair housing in the administration of these programs. Whether or not this Congressional remedy proves to be effective, in the sense of directly providing new low income housing units in New Castle which will be immediately available to the appellants or the class represented, the appellants are the intended beneficiaries of the federal affirmative fair housing effort contained in the 1964 and 1968 civil rights laws. The total absence of any effort by HUD or Interior to even investigate the housing and land use practices of New Castle, let alone any effort to apply the sanctions set forth in the applicable laws and regulations, directly aggravates the appellants' forced racial ghettoization. The wisdom or effectiveness of this administrative policy of inhibiting community development assistance to local communities with discriminatory housing and land use policies, of course, is not an issue before this Court. As much as the appellees may be inclined to speculate over the relationship between the desired administrative policy and the mitigation of the appellants' very real injuries, the Court must defer to the Congress which has perceived this relationship and, most importantly, which has defined the nexus between "racial ghettoization" and the administration of federal community development assistance that is the basis for appellants' standing to bring this action.

Indeed the importance of the federal funding practice was attested to as recently as July 1974 by the United States Commission on Civil Rights in its report entitled Equal Opportunity in Suburbia which stated with respect to Title VI:

> "Furthermore, Title VI enforcement by individual agencies tends to ignore the broad impact which the totality of federally-funded programs may have on the development of a metropolitan area. A highway funded through the Department of Transportation, water and sewer grants from HUD, and a host of other federally-funded programs may combine to play a major role in the development of a suburban community. If minorities are excluded from living in that community, they may be denied the benefits of these federally-funded programs." (at pg.43)

In Warth, supra, the plaintiffs included a group of Black and Spanish-speaking low-income residents of Rochester, N.Y. who claimed that the suburban Town of Penfield's zoning ordinance directly deprived them of equal protection of the laws. This Court held that they had not demonstrated a sufficient "injury in fact" to meet the requirements of standing to sue. Appellants concede that Warth would be apposite if appellants, as non-residents of New Castle, had directly sought judicial review of New Castle's zoning ordinance in the absence of a special proposal for low-cost housing for which they would be eligible, and in the absence of any specific local acts calculated to limit the development of low and moderate income housing. The Court's reluctance to allow "harassing" suits against local zoning ordinances in the absence of concrete housing proposals or specific discriminatory acts is obvious. These considerations are simply not relevant in an action seeking judicial review of an illegal abdication of agency civil rights enforcement. See Adams v. Richardson, 480 F.2d 1159 (D.C.Cir.1973) (en banc opinion).

The distinction between Warth and the instant case is clearly illustrated in a very recent decision by a three judge court in this Circuit with respect to federal tax exemptions for private fraternal organizations that maintain racially exclusive membership policies. Cornelius, et al. v. Benevolent Protective Order of the Elks, et al. (Slip Opinion,Docket No. 15150) (D. Conn. August 2, 1974). The action was brought by one black citizen against the Internal Revenue Service and against the Moose and Elks fraternal organizations. The Court in Cornelius unanimously agreed that the plaintiff had standing to challenge IRS for granting the tax exemptions to both the Elks and Moose Lodge even though the sole plaintiff had himself only attempted to obtain membership in the Elks. The Court stated that "Cornelius, as a black person, has standing to challenge the constitutionality of the tax exemption as applied to the Elks and Moose." (Slip Opinion, fn.5, p ii). The Court also concluded that the appellant had standing to represent a class of "all black men who would be eligible for membership in the Elks and Moose" but for their discriminatory membership policies. The Court relied on a series of decisions involving similar challenges to the tax exempt status of private, discriminatory organizations, which were recently cited by this Court with approval in Jackson v. Statler Foundation, 496 F.2d 623, 626 (2d Cir. 1974).

Significantly for the instant case, the Court in Cornelius, supra, draws a careful distinction when evaluating the plaintiff's other cause of action directly against the Elks and Moose Clubs for injunctive relief and for damages. Unlike the analysis of standing to challenge the tax exemptions, the Court concluded that the plaintiff "has standing to sue only the Elks, for he never applied to the Moose,"

(Id at 13) and similarly concluded that the class action is defective because it is not limited to a class of Black individuals who were actually denied membership on the basis of their race.

The Court, by drawing this distinction, implicitly recognized that standing to seek judicial review of a federal system of financial assistance to allegedly discriminatory local activity is not limited to minority citizens who have been directly denied participation, membership, or residency in the local organization or activity. On the contrary, a Black citizen suffers an "immediate and irreparable injury by virtue of the federal assistance alone, sufficient to form the basis of standing even though he might not otherwise have suffered an "injury in fact" sufficient for purposes of standing in an action directly against the local organization or activity.

The full scope of this distinction emerges in the leading case in this area of McGlotten v. Connally, 338 F.Supp. 448 (D.D.C. 1972). In McGlotten, Chief Judge Bazelon of the D.C.Circuit, writing for a three judge court, held that the Black plaintiff who was allegedly denied membership in a local Elks Lodge had standing to seek an injunction against the conferring of federal tax benefits or exemptions upon any private club or fraternal organization which effectively excluded non-whites from its membership. Judge Bazelon stated:

> Plaintiff alleges two injuries as a result of the tax benefits in question: First that the funds generated by such tax benefits enable segregated fraternal orders to maintain their racist membership policies; and second, that such benefits constitute an endorsement of blatantly discriminatory organizations by the federal government. We find both these

> allegations of injury sufficient to insure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." Just as "(a) person or family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and Free Exercise Clause," so a black American has standing to challenge a system of federal support and encouragement of segregated fraternal organizations." 338 F. Supp. Ct 452

See also, Pitts v. Department of Revenue 333 F.Supp. 662, 669 (E.D.Wisc.1971) and Falkenstein v. Department of Revenue, 350 F.Supp. 887, 888 (D.Ore.1972); appeal dismissed, 409 U.S. 1099 (1973).

It should also be noted that one of the plaintiffs' claims in McGlotten, which was sustained by the Court, was directly predicated upon a violation of Title VI of the 1964 Civil Rights Act -- a claim made by appellants in the instant case. The Court in Cornelius also put to rest any notion that standing depended upon a system of direct or indirect federal assistance to overtly discriminatory programs or activities. Even though the plaintiffs claim of de jure discrimination was rendered moot by a change in the Elks and Moose membership regulations, the Court indicated a willingness to take jurisdiction of a similar case, should it arise, where the discrimination alleged was de facto, stating that federal action,

> which thoughtlessly promotes discrimination "... can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920, 931 (2d Cir. 1968).
>
> (Cornelius, supra at 7)

Financial community development assistance to New Castle whose housing and land use policies are alleged to have a de facto discriminatory effect, is just as injurious

to Black citizens as the tax schemes challenged in the above line of decisions. The appellants' standing herein is particularly clear since, as Black citizens of the area, they suffer the most proximate "injury in fact" from the federal community development assistance to the Town of New Castle.

The claim by intervenor-appellees in Part C of their brief (Brief of Intervenor-Appellee, pp 42-49) that appellants have failed to state a claim under Title VI of the 1964 Civil Rights Act is not an issue before this Court. This question was thoroughly briefed by all parties in the proceedings below but was not reached by Judge Pollock in his opinion because of his disposition of the standing question. Should this Court find that appellants do indeed have standing to sue, the merits of appellants' Title VI claims, as well as their claims under the Fair Housing Law, will then be a matter for the District Court on remand.

Even if the appellees are correct in their argument against the Title VI claims, which appellants deny, this does not vitiate in any way the appellants' vigorous and substantial claims under the Fair Housing Act and, particularly the Affirmative obligation sections of that Act. 42 USC 3608(c), (d)(5)[1]

---

[1]Appellants note that the fair housing obligations under Title VIII are specifically tied by the statutory language to all of the federal agencies "housing and urban development" programs. 42 USC 3608 (c), (d) (5). Again HUD's own administrative interpretation of its Title VIII responsibilities make this abundantly clear. In the Historical Overview - Equal Opportunity in Housing, prepared by HUD in October 1972, the agency acknowledges that the affirmative action requirement of Title VIII applies to community development programs like those proposed for New Castle:

CERTIFICATE OF SERVICE

This is to certify that copies of the Appellants' Reply Brief were served on Counsel for the defendants via first class mail, postage pre-paid, on August 27, 1974, as follows:

V. Pamela Davis, Esq.
Assistant United States Attorney
U.S. Court House
Foley Square
New York, N.Y. 10007

Arthur M. Handler, Esq.
Andrea Hyde, Esq.
Golenbock and Barell
60 East 42nd Street
New York, N.Y. 10017

Jeremiah Spires, Esq.
Wikler, Gottlieb, Taylor & Howard
40 Wall Street
New York, N.Y. 10005

J. Christopher Jensen

J. CHRISTOPHER JENSEN

A substantial number of programs are subject to those affirmative provisions including those relating to urban renewal, model cities, grants for sewer and water installation, roads, schools and other public facilities relating to urban development. P.H. Equal Opportunity Housing Reporter, Par. 2301 at 2316.

Appellants would merely note with respect to Title VI that while some cases have indicated that federal funding may not be terminated in one program to penalize discriminatory actions in a wholely separate and unrelated program, there is a complex question about how to properly define the local program. There is substantial authority which indicates that the relevant program for Title VI purposes is the entire community development program of a community such as New Castle.[2]

Appellants have demonstrated substantial and compelling claims for relief under the Civil Rights Acts. For all of the foregoing reasons, this Court should reverse the decision below and remand this case for a full hearing on the adequacy of the federal civil rights enforcement in question.

Respectfully submitted,

RICHARD F. BELLMAN
LOIS D. THOMPSON
J. CHRISTOPHER JENSEN
Suburban Action Institute
57 Tuckahoe Road
Yonkers, New York 10710

J. Christopher Jensen

J. CHRISTOPHER JENSEN

Dated: August 26, 1974

---

[2]This point was thoroughly briefed by appellants below in their Memorandum in Support of the Motion for a Preliminary Injunction. (Index Number 11, Record on Appeal pp. 25-28).